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09/865,074	05/24/2001	Stephen Paul Zimmerman	8094M	6704

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EXAMINER	
TRAN LIEN, THUY	
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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/865,074
Filing Date: May 24, 2001
Appellant(s): ZIMMERMAN ET AL.

Carl J. Roof
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 2/28/05.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

4,623,548	WILLARD	11-1986
4,994,295	HOLM ET AL.	2-1991

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 21-23,25,27 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Willard.

Willard discloses snack products made from corn and other cereal flours. The snack products are made from a dough comprising 15-80% low water absorption component, 3-40% high water absorption component and a moisture content of 40-50%. The low water absorption component can be partially gelatinized cereal flours such as masa flour and whole corn flour subjected to heat treatment to partially

gelatinized the starch. The high water absorption component can be pregelatinized starch. (See columns 2-5)

Willard does not disclose the glass transition temperature of claim 25, the viscosity, water absorption index and percent of gelatinization of the pregelatinized starch as cited in claim 21, the coefficient of variation, the total volume occupied by solids and the maximum thickness as cited in claims 26, the coefficient of variation as in claim 27 and the maximum thickness as in claim 33.

The glass transition temperature of the chip is obvious in the Willard product because the snack is made from a dough containing precooked starch-based material and pregelatinized starch. The claimed dough requires 25-40% of a precooked starch-based material and 2.5-4% of a pregelatinzed starch; 50% of 50-80% is 25-40% and .5% of 50-80% is 2.5-4%. These ranges fall within the ranges disclosed by Willard. The glass transition temperature is the result of the starch found in the dough; since the Willard dough comprises the same starch, the temperature claimed is obvious in the Willard product. Willard does not disclose the percent of gelatinization of the pregelatinized starch, the viscosity and the water absorption index. However, these parameters do not define the claimed product over the Willard product because in the chip, the pregelatinized starch no longer has the viscosity, water absorption index and the percent of gelatinization claimed. The product being claimed is the chip and not the dough. The selection of a specified starch is a difference in the processing step and such step does not determine the patentability of the product. Applicant has not shown that the use of the pregelatinized starch having the parameters claimed gives

unexpected properties or makes the product different from the Willard product. The dough is fried to form the chip; thus, in the chip, the pregelatinized starch will no longer has the characteristics claimed. As to the thickness and the coefficient of variation of the chip thickness, it would have been obvious to make the snack thicker or thinner depending on the texture desired; for instance, if a crunchier taste is desired, it would have been obvious to make the snack thinner or if a less crunchy taste is desired, it would have been obvious to make the snack thicker.

Claims 24,26,28-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Willard as applied to claims 21-23,25,27 and 33 above, and further in view of Holm et al.

Willard does not disclose the chip having surface features having the parameters claimed.

Holm et al disclose snack products having a predetermined level of surface bubbling. The snack preferably has a combination of surface features as shown in figures 2-3 (see column 12, lines 1-20). The process can be adjusted to produce products ranging from those having very little bubbling to products which are totally pillowed. By adjusting the initial dough moisture, the thickness of the dough sheet and the drying environment, a chip product having any desired bubble size distribution can be created (see col. 11 lines 46-55). The snack has a thickness in the range of about .5mm to about 1.5mm (see col. 6 lines 9-10).

It would have been obvious to one skilled in the art to use the teaching of Holm et al to adjust parameters such as initial dough moisture, thickness of the dough sheet

and the drying environment to obtain a product having a bubbling and blistering surface to enhance the textural quality of the product. It would have been obvious to one skilled in the art to vary the parameters as set forth by Holm et al on column 11 lines 46-55 to obtain any distribution of bubbling and the size of the bubbles depending on the appearance and the texture desired. Holm et al disclose products with different sizes of bubbles are preferred. Since both the Holm et al and Willard products are in the field of fabricated snack products, the teaching of Holm et al is equally applicable to the Willard product. Applicant has not shown anything unexpected in the percent of surface features and dimensions claimed. It would also have been obvious to vary thickness depending on the size and distribution of bubbles as taught by Holm et al. If the thickness varies, then the coefficient of variation of the thickness will also vary. The bubble provides interior void and as stated above, it would have been obvious to vary the size of the bubbles which consequently affect the size of the interior void and the total volume occupied by solids. The distribution of the bubbles will also affect the volume occupied by solids and it would have been obvious to vary the distribution of the bubbles depending on the appearance and texture desired.

(10) Response to Argument

On page 3 of the appeal brief, appellant argues the examiner has not identified any sections of Willard that teach or suggest a pregelatinized starch having the required characteristics. In making this argument, appellant does not take into consideration the position taken in the office action mailed on May 5, 2004. As set forth in the rejection, the product being claimed is the chip, not the dough. The selection of a specified

starch is a difference in the processing step and such step does not determine the patentability of the product. Applicant has not shown that the use of the pregelatinized starch having the parameters claimed gives unexpected properties or makes the product different from the Willard product. The dough is fried to form the chip; thus, in the chip, the pregelatinized starch will no longer have the characteristics claimed. The viscosity and water absorption index of the pregelatinized starch of the dough cannot be determined in the chip. The claims are not directed to a chip having the specific viscosity and water absorption index. Appellant states by careful control of the dough composition and specific raw material properties, a tortilla style chip could be made without baking before frying. On page 4 of the appeal brief, appellant argues Willard fails to recognize that parameters such as % pregelatinization, viscosity or WAI of the pregegelatinized starch enable the making of a chip without baking before frying. The issue of baking before frying is also a difference in processing and does not determine the patentability of the product. As support by appellant's argument, the viscosity, % pregelatinized and water absorption index have not shown unexpected result. While Willard does not disclose such parameters for the pregelatinized starch, he also teaches the same result that appellant argues is unexpected because Willard also teaches to fry without first baking to form the chip. On pages 4-5, appellant argues positions taken by the examiner in an office action that has been withdrawn. As set forth clearly in the rejection in the office action mailed on 5/5/04, the parameters of the pregelatinized starch does not determine the patentability of the product being claimed which is the chip. Appellant does not claim and has not shown that the pregelatinized starch in the

final chip product has the claimed viscosity, water absorption index and % gelatinization.

On page 6 of the appeal brief, appellant argues the teaching of Holm requires specific processing step, including a drying step and appellant's invention requires no extra process step. This argument is not persuasive because it is not commensurate in scope with the claims. The claims are not directed to a process of making the chips; the claims are directed to the chips. How the chips are made does not determine its patentability. Appellant further argues the Willard/Holm combination teaches away from the present invention because Holm teaches bubble control by process parameters where as the current invention relies upon composition parameters. Whether processing parameters or composition parameters are used, the same end result is obtained. Since appellant is not claimed a composition nor a process, the difference is not an issue to be considered. Appellant does not claim a chip having the recited % pregelatinized, viscosity and water absorption index. Even if one were motivated to add another processing step to make a bubbly chip, the claims would still not define over the prior art because the claims are not directed to a process. As long as the rejection show the motivation to make a bubbly chip and the obviousness of such modification, the requirement is met for the claims under consideration because the prior art teach the product claimed.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

LIEN TRAN
PRIMARY EXAMINER
Group 1700

Lien Tran
May 13, 2005

Conferees

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